INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Argument	6
Conclusion	11

CITATIONS

Case:	
Cephus v. *United States*, 324 F. 2d 893	8
Constitution, statutes and rules:	
Sixth Amendment	2, 8
18 U.S.C.:	
8	2, 9
371	3
472	9
473	9
495	3, 9
2311	3, 9
2314	3, 8, 9
2315	3, 8, 9
Federal Rules of Criminal Procedure:	
Rule 20	4
Rule 29(a)	6, 7

219-969—66

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1258

WILLARD L. RICHARDSON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1617 Misc.

ALLEN ELI WRIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Wright Pet. App. B) is reported at 356 F. 2d 261.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 1966 and rehearing was denied on March 28, 1966. The petitions for writs of certiorari

were filed on April 27, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the denial of motions for acquittal at the close of the government's case by certain co-defendants who had waived a jury and were ultimately acquitted by the trial judge infringed any constitutional right of petitioner Wright to obtain the testimony of such co-defendants.

2. Whether stolen United States Treasury Bonds of a face value of $80,000 for which the owner had been given replacements constitute obligations or other securities of the United States and were of a value of over $5,000 as required 18 U.S.C. 2314.

3. Whether the evidence was sufficient to support the conviction of petitioner Richardson.

STATUTES INVOLVED

18 U.S.C. 8 provides:

> The term "obligation or other security of the United States" includes all bonds, certificates of indebtedness, national bank currency, Federal Reserve notes, Federal Reserve bank notes, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps and other representatives of value, of whatever denomination, issued under any Act of Congress, and canceled United States stamps.

18 U.S.C. 2311 in pertinent part provides:

> "Value" means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof.

STATEMENT

Petitioner Wright was convicted by a jury in the United States District Court for the Southern District of Texas on nineteen counts charging the interstate transportation and disposal of United States Treasury Bonds (18 U.S.C. 2314, 2315), forging endorsements thereon and uttering them (18 U.S.C. 495), and a conspiracy to commit the above (18 U.S.C. 371) (R. 19–39, 1724–1726). He was sentenced to imprisonment for ten years (R. 1726–1729). Petitioner Richardson, a Mississippi attorney, who elected to be tried by the court, was charged only on the conspiracy count and was convicted by the court (R. 1686–1688). He was given a suspended sentence of two years and placed on probation (R. 1731–1732).[1]

The evidence showed that in 1961, eight United States Treasury bonds, each having a face value of $10,000, registered in the name of Greenberg, were stolen from the Greenberg farm in New Jersey (R.

---

[1] Co-defendant Wuensche was convicted by the jury on all counts. Another defendant, Grafft, tried on the conspiracy count, was acquitted by the jury.

Naidich, a New York attorney, was convicted by the court on the conspiracy count. Other co-defendants, Suttles, Simmerman, Guilano and Zimmerman, charged in the conspiracy count, were acquitted by the court.

206–211). On July 10, 1962, Di Fonzo[2] made arrangements for Wuensche to buy the eight bonds (R. 298), at ten percent of their face value (R. 299). At a meeting in New York among co-conspirators Wuensche, Naidich and others, to discuss how to negotiate the bonds (R. 605), a Mr. Leivia suggested that he had a source in Houston, Texas, who could dispose of the bonds (R. 523–524, 607). Shortly thereafter, Wuensche, using the name Wentz, went to Houston where he met petitioner Wright (R. 352–353, 360) who then made several unsuccessful efforts to dispose of the bonds (R. 1109–1116, 1134–1141, 1160–1164, 1171–1174) including an attempt to buy a car with one (R. 1115, 1136–1139). Wuensche returned to New York (R. 411) and there obtained a driver's license which he signed in the name of Greenberg. Later Wuensche returned to Houston (R. 615–616, 691–692).

With the aid of petitioner Richardson, Wright arranged with Ted Millette to pledge the bonds to Millette's father-in-law, John Walker for $60,000. Richardson told Millette that $20,000 could be made in the transaction, with Walker getting $10,000 and he and Millette each receiving $5,000 (R. 1239).

Wright, Millette and Richardson flew to Houston (R. 363) where they met Wuensche who was using the name Greenberg (R. 360–363, 496–497). There Richardson had various legal documents drawn up for use in the transaction (R. 1243–1250). On July 20, 1962, Richardson, Wright, Millette and Wuensche

---

[2] Di Fonzo pleaded guilty to the conspiracy count in New York under Rule 20, F.R. Crim. P.

(posing as Greenberg) appeared before Mr. Edgar A. Luton, First Vice-president of the East End Bank in Houston, Texas, who had been advised of their coming by Suttles (R. 874–879). In front of this officer, using the New York driver's license as identification, Wuensche endorsed the eight bonds with the name Greenberg, and the bank officer completed the certification (R. 879–884). Thereafter, Ted Millette endorsed the Walker check to Wright (R. 880–895). Wright explained to the banker that a loan was being made on the bonds (R. 883). Wright opened an account in the bank and when the check was cleared by telephone, withdrew $30,000 in cash (R. 896).

At the close of the government's case, when the trial court called upon defense counsel for motions, counsel for Wright stated that he wished the non-jury defendants to make their motions first. The court told counsel that he would not rule on the motions of the non-jury defendants prior to submission of the case to the jury as he did not want his decision to have any influence on the jury (R. 1338–1339). Following arguments on motions for acquittal on behalf of each defendant, the court overruled all such motions (R. 1337–1432).

Thereafter, counsel for Wright said he wanted to call defendants Simmerman, Richardson and Suttles (R. 1434). Their counsel said they would not permit their clients to testify unless they were acquitted (R. 1434, 1435). In view of the fact that those codefendants were being tried by the court (R. 1442), the judge allowed counsel for Wright, in the presence of the jury, to call Richardson, Simmerman, Suttles and Zimmer-

man as witnesses. Their respective counsel objected to their testifying and the court sustained all such objections (R. 1444–1448). Thereafter all defendants rested without offering further testimony (R. 1448–1451). At the close of the whole case, motions for acquittal were made and denied (R. 1452–1456). Those who submitted their cases to the jury made closing arguments (R. 1470–1550), and after the jury had retired and returned verdicts, the remaining defendants argued their cases to the court (R. 1604–1686). The court convicted Richardson and Naidich and acquitted the other defendants tried before it.

ARGUMENT

1. Petitioner Wright claims that he was denied his rights under the Sixth Amendment because, at the end of the government's case, the trial judge denied motions for judgments of acquittal, under Rule 29(a), Fed. R. Crim. P.,[3] by co-defendants who had waived a jury and who were subsequently acquitted by the judge. Petitioner urges that that ruling deprived petitioner of the testimony of those co-defendants. The argument lacks merit. It assumes that the co-defendants would have testified in petitioner's favor notwithstanding the repeated assertions by Wright's counsel that their defenses conflicted with Wright's (R. 97–109, 596–598, 844–846). More im-

[3] The trial judge stated (R. 1432): "Motions for acquittal as to each of the defendants is overruled." He again overruled the motions when they were renewed (R. 1452–1456) at the close of the case, stating that he would not consider the case submitted until all defense counsel had had an opportunity for argument.

portant, petitioner's argument fails to recognize that quite different standards are involved in the grant of a motion to acquit under Rule 29(a) and an acquittal by the trier of fact at the close of the case. The district court properly denied the defendants' motions for judgment because, as to each defendant, the government had produced evidence requiring the submission of the case to the trier of fact.[4] The court of appeals held (Wright Pet. App. B, p. 7) that "in the state of the record at the close of the government's case, with substantial evidence having been introduced against all defendants * * * the Court was

---

[4] Petitioner Richardson was convicted, so that as to him there is no foundation for the argument. The defendant Simmerman was an attorney who tried to help dispose of the bonds involved in the substantive counts and signed the bonds as a notary witnessing the endorsement. He admitted to the F.B.I. that Greenberg was not present when he notarized the bonds (R. 1113–1115, 1169–1170, 1196–1204). Petitioner Wright claims that he wanted to call Simmerman to testify that he had checked out the bonds and found them to be genuine. Simmerman made no such claim to the F.B.I. and there is no dispute that the bonds were stolen.

The evidence against the defendants Suttles and Zimmerman related primarily to an aspect of the conspiracy count not involved in the substantive counts—an attempt, after the Greenberg bond transaction, to dispose of United States bearer bonds which Wright was to obtain from one Grafft (who was acquitted by the jury) and to negotiate with the aid of Zimmerman and Suttles. One Gray testified to this aspect of the case (R. 578–579, 626, 629–630, 847). Petitioner Wright states that if Zimmerman and Suttles had testified, they would have contradicted Gray. Since there were other witnesses as to the Greenberg bonds and since any contradiction of Gray's testimony by Suttles or Zimmerman would not have had significant bearing on the Greenberg bonds, it is obvious that petitioner Wright was in no way deprived of meaningful evidence by the judge's denial of the motions to acquit these defendants.

required to permit the case to go to the jury." The subsequent decisions by the jury and by the judge, respectively, to acquit one or more of the defendants has no bearing on the question of whether the government had made out a *prima facie* case. The petition does not raise the question presented in *Cephus* v. *United States*, 324 F. 2d 893 (C.A.D.C.), on which petitioner relies, because in that case it was expressly held that the government had failed to present a *prima facie* case. The Sixth Amendment gave petitioner no right to require that his alleged co-conspirators be tried before he was, in the hope that, if acquitted, they might then testify on his behalf.

2. Petitioner Wright argues (Pet. 9–13) that, since the stolen Greenberg bonds were replaced by the government, the bonds involved in the conspiracy were worthless and hence not "genuine" bonds as alleged in the indictment. This argument is without merit. One of the attributes of most United States bonds is that the government will replace them if they are stolen. Hence petitioners' argument would grant immunity for the transportation, forging and uttering of most stolen government securities. No such construction of the statute is compatible with its purpose. The word "genuine" in the indictment served to distinguish the bonds in issue from counterfeit ones. The word "genuine" was used in the counts based on 18 U.S.C. 2314 and 2315 since those sections expressly exclude from coverage falsely made or counterfeited securities of the United States. Counterfeiting United States securities is subject to pun-

ishment under other sections and need not involve interstate commerce. See 18 U.S.C. 472 and 473. As the court of appeals concluded (Wright Pet. App. B, p. 6) "[t]he fact that the bonds were cancelled would affect their redeemability, but not their genuineness." In all events, since the indictment specifically spelled out the serial number of each bond, no uncertainty was created as to the identity of the bonds in issue by the use of the word "genuine."

The fact that 18 U.S.C. 8, in defining the term "obligation or other security of the United States," specifically includes canceled stamps does not mean that bonds, which are not marked canceled on their face, but are merely canceled on the government register, are consequently outside the coverage of 18 U.S.C. 495, 2314 or 2315. Stolen bonds like those here involved do not, like canceled stamps, show on their face that they are not capable of being used for the purpose for which they are issued. Such bonds are thus on their face valuable property.

3. Petitioner Richardson claims that since the bonds were replaced by the United States, the stolen bonds were worthless and thus not of a value of $5,000 or more required under 18 U.S.C. 2314 and 2315. The short answer is that the term "value" as used in those sections is defined in 18 U.S.C. 2311 to include the "face, par, or market value, whichever is the greatest." The face value of each bond was $10,000. There was thus no occasion to determine the market value of these bonds, particularly where the evidence showed the eight bonds were disposed of for $60,000.

4. Petitioner Richardson raises three questions related to the sufficiency of the proof. All are insubstantial.

A. He first argues (Richardson Pet. 5–7) that since the evidence showed that the bonds were used only to secure a loan, they were not "disposed of" and that there was, therefore, a variance between the indictment and the proof. Actually, however the transaction is viewed, the evidence revealed a conspiracy to utter, forge, and dispose of the bonds—the only count upon which petitioner Richardson was convicted. In any event, it was for the trier of fact to decide, as the court of appeals observed (Wright Pet. App. B, p. 9), "whether this was an hypothecation in the usual sense, or was in fact part of a scheme for disposing of the bonds with no thought of repaying the loan or recovering the bonds." In light of the evidence presented, the trier of fact could conclude that Richardson, who was an attorney, did not expect the bonds to be redeemed. A realistic view of the evidence indicates that the bonds were disposed of rather than hypothecated.

B. Petitioner Richardson (Pet. 7–8) also argues that there was no evidence to corroborate his extrajudicial statement, which indicated that he was to receive $5,000 for his part in this scheme. However Richardson's participation is fully corroborated. He not only was the vital link between Walker and Wright (R. 353–363) but he dictated most of the legal documents used to perpetrate the fraud (see R. 1243–1259) and participated in the final transaction at the bank (R. 874–900). Thus Richardson's

participation in the conspiracy is fully documented by evidence independent of his statement.

C. Finally, petitioner Richardson seems to argue that he did not knowingly participate in or join the conspiracy (Pet. 11). However, the evidence is inconsistent with the claim that he was "unknowingly" involved. His statement to the F.B.I., admitted into evidence without objection (R. 1236), confirms that Richardson was to be paid $5,000 for his aid in this venture. The court sitting as the trier of fact could reasonably conclude that an attorney would not consider himself entitled to a $5,000 "finder's fee" to dispose of United States Treasury Bonds if everything were legitimate.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
THEODORE G. GILINSKY,
Attorneys.

JUNE 1966.

U. S. GOVERNMENT PRINTING OFFICE: 1966